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MANIFEST DESTINY AND AMERICAN INDIAN RELIGIOUS FREEDOM: *SEQUOYAH, BADONI, AND THE DROWNED GODS*

Howard Stambor*

Introduction

The area of worship cannot be delineated from social, political, culture, and other areas of Indian lifestyle, including his general outlook upon economic and resource development [W]orship is . . . an integral part of the Indian way of life and culture which cannot be separated from the whole. This oneness of Indian life seems to be the basic difference between the Indian and non-Indians of a dominant society.¹

In his statement before the Senate Select Committee on Indian Affairs, Mr. Barney Old Coyote of the Crow Tribe of Montana underlined the issues that continue to vex legislative, administrative, and judicial efforts to deal with matters relating to the religious practices of American Indians. The various tribal religions practiced by native peoples in the United States are almost without exception inextricably linked with what non-Indian society regards as *culture*.² This unity of culture and religion makes American Indian forms of worship alien and difficult for the non-Indian to understand³ and poses difficult questions for

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1. *American Indian Religious Freedom: Hearings on S.J. Res. 102 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 2d Sess. 86-87 (1978) [hereinafter cited as *Hearings on S.J. Res. 102*] (statement of Barney Old Coyote, Crow Tribe, Montana).

2. See, e.g., the remarks of Chief Oren Lyons of the Onondaga Tribe appearing in the ARTS ADVOCATE, Jan. 1975, at 2, col. 4, and cited in Note, *Native Americans Versus American Museums—A Battle for Artifacts*, 7 AM. INDIAN L. REV. 125, 127 (1979): "Religion, as it has been and is still practiced today on the reservation, permeates all aspects of tribal society. The language makes no distinction between religion, government, or law. Tribal customs and religious ordinances are synonymous. All aspects of life are tied in to one totality."

3. D. GETCHES, D. ROSENFELT, & C. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 504 (1979) [hereinafter cited as GETCHES]:

Much of Indian religious life does not include the existence of a church, periodic meetings, ritual, and identifiable dogma. Instead, there is a pervasive quality to Indian religion which gives all aspects of Indian life and society a spiritual significance. In pursuit of traditional Indian religion, an Indian may feel compelled to relate to nature and

courts⁴ that must decide whether certain arguably religious practices of American Indians lie within the shelter of the free exercise clause of the first amendment.⁵ Various courts have responded to this challenge with conflicting conclusions about which American Indian practices are indeed religious and which are merely expressions of culture or personal preference unprotected by the first amendment.⁶

The conquest and oppression of the American Indian tribes by the white man was a shameful episode in our national history, an enterprise so unworthy of a nation that holds itself forth as the champion of liberty and democracy that it is difficult to imagine any but the most hardened and cynical disciple of manifest destiny who today would be unwilling to join in the consensus that regards the treatment of the American Indian by the white man with shame and horror.⁷ What is not as widely recognized or understood, however, is that the lingering effect of oppression has had a lasting and pervasive impact on Indian religions as they

to others in a particular way. Unfamiliarity with Indian spiritual life and an inherent suspicion of fraud when religious doctrine and practice are not crisply defined by ancient writings or a central authority are obstacles to judicial understanding and protection of Indian religion.

See also Harris, *The American Indian Religious Freedom Act and Its Promise*, 5 AM. INDIAN J. 7 (June 1979): "Non-Indians can comprehend worship in a church or synagogue, but not on a mountaintop or with an eagle feather." See generally FEDERAL AGENCIES TASK FORCE, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT P.L. 95-341, 8-12 (1979) [hereinafter cited as TASK FORCE REPORT] for a thorough and sensitive analysis of the nature of American Indian tribal religion and its intimate relation (if not identity) with tribal culture.

4. GETCHES, *supra* note 3, at 507-08: "the struggle to categorize neatly what Indians are moved to do by their traditions . . . [illuminates] the difficulty our legal system has in applying constitutional protections to a strange culture's value system and spiritual life."

5. U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

6. Compare *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (state law banning possession and use of peyote may not be enforced against practicing member of Native American Church) with *State v. Soto*, 21 Or. App. 794, 537 P.2d 142 (1975), *cert. denied*, 424 U.S. 955 (state law banning possession and use of peyote may be enforced against practicing member of Native American Church). Compare *Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975) (wearing of long hair by Indian is a religious practice protected against state interference by the first amendment) with *New Rider v. Board of Educ.*, 480 F.2d 693 (10th Cir.), *cert. denied*, 414 U.S. 1097 (1973) (wearing of long hair by Indian is not a religious practice and is therefore not protected against state interference by the first amendment). See generally *id.* (Douglas, J., dissenting from denial of certiorari); Note, *The Right to Wear a Traditional Indian Hair Style—Recognition of a Heritage*, 4 AM. INDIAN L. REV. 105 (1976).

7. See e.g., TASK FORCE REPORT, *supra* note 3, at 1-17.

are practiced today and on the ability of American Indians to carry on what remains of their religious practices.⁸ All too often, ignorance and inadvertence have come to replace the avarice and malice that formerly inspired government attitudes toward the American Indian.⁹ As Senator James Abourezk, Chairman of the Senate Select Committee on Indian Affairs, has noted, "[I]n recent years, there have been increasing incidents of infringement of the religious rights of American Indians. New barriers have been raised against the pursuit of their traditional culture, of which the religion is an integral part."¹⁰ Senator Dewey F. Bartlett warned that "[w]e do not need to add continued violation of American Indian religious freedom to the long list of rights consistently abridged by the Federal government."¹¹

The long history of oppression of the American Indian continues today. It is a bitter irony that this history makes it increasingly difficult for American Indians to assert successfully the right to practice their religion free from government interference, government interference having already so effectively alienated them from their tribal religions.¹² Much of this interference has been incidental to the goals of the legislation or regulation that has impinged on the religious practices of American Indians, but the impact is real nevertheless:

A lack of U.S. governmental policy has allowed infringement in the practice of native traditional religions. These infringements came about through the enforcement of policies . . . which are basically sound and which the large majority of Indians strongly support. . . . But, because such laws were not

8. T. Pressly, *Freedom of Religion for the American Indian in the Twentieth Century*, in *STUDIES IN AMERICAN INDIAN LAW* 285, 294 (R. Johnson ed. 1970): "The total impact of the white man's religion upon the red man is hard to ascertain at this time. Certainly it has affected and changed many Indian tribal practices and has also driven many rituals underground."

9. See *Native Americans' Right to Believe and Exercise Their Traditional Native Religions Free of Federal Government Interference: Report to Accompany S.J. Res. 102*, S. REP. NO. 709, 95th Cong., 2d Sess. 4-5 (1978) [hereinafter cited as S. REP. 709, 1978]. "Lack of knowledge, unawareness, insensitivity, and neglect are the keynotes of the Federal Government's interaction with traditional Indians' religions and cultures."

10. *Hearings on S.J. Res. 102*, *supra* note 1, at 1.

11. *Id.* at 7.

12. See GETCHES, *supra* note 3, at 509:

Perhaps the process [Justice] Douglas [dissenting from the denial of certiorari in *New Rider v. Board of Educ.*, 414 U.S. 1097, 1101-1103 (1973)] describes has been so effective in suppressing Indian culture that traditional practices emerge only in isolated instances, lacking in the consistency that generally marks a religious practice.

intended to relate to religion and because there was a lack of awareness of their effect on religion, Congress neglected to fully consider the impact of such laws on the Indians' religious practices.

It is only within the last decade that it has become apparent that such laws, when combined with more restrictive regulations, insensitive enforcement procedures and administrative policy directives, in fact, have interfered severely with the culture and religion of American Indians.¹³

This article will discuss two recent appellate court decisions¹⁴ that have had precisely this impact on the religious practices of two great Indian nations, the Cherokee and the Navajo. In each case, tribal representatives alleged that the inundation by federal water projects of sites sacred to the traditional tribal religions was an unconstitutional infringement of their first amendment right freely to exercise their religion. In both cases the courts ruled against the Indians. This article will suggest that the results of both cases were, in a practical sense, inevitable, though both courts failed to address the constitutional question raised by the Indians in a principled and constitutionally defensible manner. This article will also examine briefly the American Indian Religious Freedom Act of 1978,¹⁵ raised by both tribes as a statutory claim, concluding that the statute is no more than a statement of good intentions and otherwise impotent as an instrument for righting the constitutional wrongs suffered by American Indians in their efforts to practice their religion free from government interference.

I. *The Cherokee Claim: Sequoyah v. Tennessee Valley Authority*

In 1979 three Cherokee Indians acting as individuals and two Cherokee tribal organizations jointly petitioned the District Court for the Eastern District of Tennessee for an injunction to restrain the Tennessee Valley Authority from closing the floodgates of

13. S. REP. 709, 1978, *supra* note 9, at 2.

14. *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir.), *cert. denied* 449 U.S. 953 (1980) and *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied sub nom. Badoni v. Broadbent*, 452 U.S. 954 (1981).

15. Act of Aug. 11, 1978, Pub. L. No. 95-341, 92 Stat. 469 (codified in part at 42 U.S.C. § 1996).

Tellico Dam on the Little Tennessee River.¹⁶ The TVA's action would begin the impoundment of water to form the Tellico Reservoir, flood the valley of the Little Tennessee, and inundate burial grounds and sites sacred to the followers of the traditional Cherokee religion.¹⁷ The lead plaintiff, 78-year-old Ammoneta Sequoyah, a practicing Cherokee medicine man, testified that the impoundment of the Tellico Reservoir would destroy the source of his medicine and make it impossible for him to continue to practice his traditional religious healing art.¹⁸ Numerous other Cherokee affiants testified as to the sacred nature of the lands scheduled for inundation.¹⁹ However, the court denied plaintiffs' motion for a preliminary injunction and granted defendant's motion to dismiss for failure to state a claim upon which relief can

16. Writing in the 1978 *Supreme Court Review*, Martin E. Marty expressed surprise at how the "snail darter case," *TVA v. Hill*, 437 U.S. 153 (1978), had upstaged two important religion cases the Supreme Court had decided in the 1977-78 term. See Marty, *Of Darters and Schools and Clergymen: The Religion Clauses Worse Confounded*, 1978 Sup. Ct. Rev. 171 (1978). In *TVA v. Hill*, environmentalists' concern for the fate of a small fish had succeeded in blocking the completion of the mighty Tellico Dam project on the Little Tennessee River. The two religion cases were *McDaniel v. Paty*, 435 U.S. 618 (1978) and *New York v. Cathedral Academy*, 434 U.S. 125 (1977). It is little short of ironic that the same Tellico Dam project was soon to generate its own litigation grounded in the free exercise clause of the first amendment.

17. *Sequoyah v. TVA*, 480 F. Supp. 608 (E.D. Tenn. 1979).

18. *Id.*, Plaintiffs' Memorandum, Exhibit D (Affidavit of Ammoneta Sequoyah):

If the water covers Chota and the other sacred places of the Cherokee along the River, I will lose my knowledge of medicine.

If the lands are flooded, the medicine that comes from Chota will be ended because the strength and spiritual power of the Cherokee will be destroyed

If this land is flooded and these sacred places are destroyed, the knowledge and beliefs of my people who are in the ground will be destroyed.

19. See *id.*, Exhibits C-GG, Affidavits of Affiants. Albert L. Wahrhaftig, Chairman, Department of Anthropology, Sonoma State University, testified:

In short, to attempt to understand or maintain Cherokee religion without access to known and significant sites in the 'old country' would be like attempting to understand and practice Judaism or Christianity without the Book of Genesis. These sites represent the ultimate foundation of Cherokee belief and practice, now, and for the future.

Emmaline Driver stated: "If they are flooded, our spiritual strength from our forefathers will be taken away from us, along with the origin of our organized religion. The white man has taken nearly everything away from us, our heritage, culture, traditions, and our way of life that is our religion."

Richard Crowe stated:

This land is sacred to me and my people, and it is hard for me to talk about how I feel about this land.

I have been going to the lands at Tellico for many years, for at least more than thirty (30) years. Before I went myself, I used to hear my people, my parents, speak of the land. My people referred to it in the Cherokee language. They said: *di ga ta le no hr* [in Cherokee script in original]. This means, "This is where WE began."

be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) after hearing oral argument on the motions.²⁰

The Tennessee Tellico Dam has had a stormy history.²¹ Judge Robert L. Taylor, in his memorandum opinion denying plaintiffs the injunctive relief they had sought, indicated that since 1966, when Congress first appropriated money for the construction of the dam, nine lawsuits have been brought at the district court level and that progress on the dam had been impeded by two injunctions, though the project had been free from injunction for nine of its fourteen years of existence.²²

The Court characterized plaintiffs' claim as follows:

The land . . . which will be flooded . . . is sacred to the Cherokee religion and a vital part of the Cherokee religious practices. . . . The plaintiffs contend that impoundment of the reservoir will violate their constitutional right to free exercise of their religion, in addition to their claimed statutory rights of access to lands of religious and historical significance.²³

After rejecting plaintiffs' statutory arguments, the court addressed plaintiffs' constitutional claims.²⁴

The court assumed that "the land to be flooded is considered sacred to the Cherokee religion and that active practitioners of that religion would want to make pilgrimages to this land as a precept of their religion."²⁵ Nevertheless, it held that the free exercise clause of the first amendment did not require that injunctive relief be granted to the Cherokee plaintiffs.²⁶ Citing eight Supreme Court free exercise decisions, the court summarized the elements of a free exercise claim in two short sentences: "An essential element to a claim under the free exercise clause is some form of governmental coercion of actions which are contrary to religious belief" and "This governmental coercion may take the form of pressuring or forcing individuals not to participate in religious practices."²⁷

20. *Sequoyah v. TVA*, 480 F. Supp. 608, 612 (E.D. Tenn. 1979).

21. For a history of the controversy generated by the decision to build the Tellico Dam, as well as a sketch of the historical significance of the region, see *TVA v. Hill*, 437 U.S. 153, 156-59 (1978).

22. *Sequoyah v. TVA*, 480 F. Supp. 608, 610 (E.D. Tenn. 1979).

23. *Id.*

24. *Id.* at 611.

25. *Id.*

26. *Id.* at 612.

27. *Id.* at 611.

The court first found that the impoundment of the Tellico Reservoir would have no coercive effect on plaintiffs. Instead of proceeding systematically to determine if closing the dam would be a form of "pressuring or forcing individuals not to participate in religious practices," the court framed the second level of inquiry in terms so broad that it effectively encompassed the first inquiry. "The question thus becomes whether the denial of access to government-owned land considered sacred and necessary to plaintiffs' religious beliefs infringes the free exercise clause."²⁸ The inquiry thus posed delved no farther than the finding on the first question.

Having dodged the difficult second question, the court leaped to a legal non sequitur by holding that the absence of a property interest in the lands about to be inundated barred plaintiffs from asserting a free exercise claim in regard to those lands. "The Court has been cited to no case that engrains the free exercise clause with property rights."²⁹ The second telling question the court had posited for analysis of free exercise claims remained unasked and unanswered. In support of its property interest analysis, the court cited precedent that held that the first amendment does not grant a right of entry to federal property that is normally closed to the public.³⁰ The inapt analogy is particularly troubling when one considers the historical reasons for the Cherokees' inability to assert a property interest in lands on which their sacred sites and burial places lie: these former Cherokee lands were taken from them by a powerful government bent on conquest.³¹ The court's reliance on this lack of a property interest is an insensitive, inequitable, and irresponsible evasion of the more difficult constitutional claim that the Indians raised.

28. *Id.* at 612.

29. *Id.*

30. *Id.*, citing *Downing v. Kunzig*, 454 F.2d 1230 (6th Cir. 1972).

31. "The Cherokee race was removed from Tennessee by the federal government in a series of political and military steps, but not before the Cherokees had developed deep religious, cultural and historical ties with their homeland." Plaintiffs' Memorandum, *supra* note 18, at 2. These lands are not now closed to the public. When they were in private hands, plaintiffs had no difficulty in gaining access to them. They will now be closed to the public only because government action will cause them to be inundated. Thus, the court's analogy to prison and military reservation cases in which plaintiffs sought to establish a first amendment forum in a place where none had been previously available to them or to others, and where reasonable time, place, and manner regulation would not permanently or substantially impair the exercise of a constitutionally protected right, does not persuade. See *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

On appeal, the Sixth Circuit, with one judge dissenting, affirmed the district court's denial of plaintiffs' motion for injunctive relief. Because the district court had considered matters outside the pleadings, the court of appeals treated the district court's judgment granting defendant's motion for dismissal as one for summary judgment.³² The appellate court, however, explicitly rejected the district court's holding that plaintiffs could not assert a first amendment claim to enjoin TVA from flooding the sacred valley because plaintiffs had no property interest in the lands that would be flooded.³³ The court of appeals then analyzed the troubling question avoided by the district court—whether the action of the Tennessee Valley Authority, in flooding land conceded to be sacred to the Cherokee, “pressur[ed] or forc[ed] individuals not to participate in religious practices.”³⁴

The court began its inquiry by setting forth evidence in the record that tended to show that the claims of the plaintiffs were cultural rather than religious,³⁵ implicitly accepting the dubious assumption that Indian culture may be distinguished from Indian religion.³⁶ The court concluded from the more than twenty affidavits submitted in support of plaintiffs' motion for injunctive relief that plaintiffs' claims were fundamentally cultural rather than religious.³⁷ A careful reading of the affidavits, however, suggests that the court summarized carefully selected portions in order to undercut the religious foundation of plaintiffs' claim.³⁸ The court's strategy is clear: to address the free exercise question raised by plaintiffs and effectively ignored by the trial court, yet still affirm the trial court's judgment, it would have to show that plaintiffs' claims did not satisfy the constitutional standards for determining whether a belief is religious. The court erroneously assumed that characterization of plaintiffs' claims as cultural as

32. *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir. 1980).

33. *Id.* at 1164: “While this [lack of a property interest] is a factor to be considered, we feel it should not be conclusive in view of the history of the Cherokee expulsion from Southern Appalachia followed by the ‘Trail of Tears’ to Oklahoma and the unique nature of plaintiffs' religion.”

34. *Sequoyah*, 480 F. Supp. at 611, citing *McDaniel v. Paty*, 435 U.S. 618 (1978). Compare *supra* text accompanying notes 27-31.

35. *Sequoyah*, 620 F.2d at 1162: “the documents in the record indicate that the Cherokee objections to the Tellico Dam were based primarily on a fear that their cultural heritage, rather than their religious rights, would be affected by flooding the Little Tennessee Valley.”

36. Compare *supra* text accompanying notes 1-12.

37. *Sequoyah*, 620 F.2d at 1162.

38. *Sequoyah*, 480 F. Supp. 608, Plaintiffs' Memorandum, Exhibits C-GG.

well as religious would place them beyond the bounds of the free exercise clause. But the Supreme Court has never held that a belief must be exclusively religious in order to qualify for first amendment protection.³⁹

The court's emphasis on the nonreligious element of plaintiffs' claims could not wholly obscure their religious content.⁴⁰ Forced to acknowledge a religious component, the court shifted its approach in an attempt to minimize the significance of that component by trivializing it.⁴¹ A misreading of the affidavits submitted to the trial court buttressed that trivialization.⁴² Having rendered plaintiffs' claim a hybrid of culture and religion, the court ventured into an area it mistakenly believed constitutionally gray. It conceded without discussion that plaintiffs had met the threshold requirements that they did in fact have a religion and that they sincerely adhered to it.⁴³

"Centrality": A Spurious Constitutional Test

The court opened its analysis of the constitutional question by asserting that *Sherbert v. Verner*⁴⁴ and *Wisconsin v. Yoder*⁴⁵ required a two-step analysis in evaluating a free exercise claim.

First, it must be determined whether the governmental action does in fact create a burden on the exercise of the plaintiff's re-

39. See *Callahan v. Woods*, 658 F.2d 679, 684 (9th Cir. 1981).

40. See *supra* text accompanying note 25.

41. *Sequoyah*, 620 F.2d at 1162-63: "The Cherokees who are plaintiffs in this action obviously have great reverence for their ancestors and believe that the places where their ancestors lived, gathered medicines, died and were buried, have cultural and religious significance. *Similar feelings are shared by most people to a greater or lesser extent.*" (Emphasis added.)

42. *Sequoyah*, 620 F.2d at 1163:

There is no showing that any Cherokees other than Ammoneta Sequoyah and Richard Crowe ever went to the area for religious purposes during [the 100 years prior to TVA's acquisition of the land] At most, plaintiffs showed that a few Cherokees had made expeditions to the area, prompted for the most part by an understandable desire to learn more about their cultural heritage.

Compare notes 18 and 19 *supra*. Indeed, the failure of plaintiffs' affiants to satisfy the court may well be simply a matter of felicity of language because it is particularly difficult to express the religious nature of an experience in words that convey clear meaning to someone who has not shared that experience. This predicament intensifies when the other sees the religious experience as something that corresponds more closely to his notion of culture than of religion. In this regard, consider the remarks of GETCHES, *supra* note 3.

43. *Sequoyah*, 620 F.2d at 1163.

44. 374 U.S. 398, 402-03 (1963).

45. 406 U.S. 205, 214-15 (1972).

ligion. If a burden is found it must be balanced against the governmental interest, with the government being required to show an overriding or compelling reason for its action.⁴⁶

This first step assesses the "quality of the claims"⁴⁷ for which litigants are seeking free exercise protection.

In addressing this first question, the court relied on language in *Yoder*⁴⁸ and two state cases, *Frank v. Alaska*⁴⁹ and *People v. Woody*,⁵⁰ to support its thesis that even if plaintiffs' claims were religious, they were not entitled to free exercise protection unless the disputed practices were central to the religion.⁵¹ None of the cases, however, provides solid authority for the court's "centrality" test. Initially, simply on its facts, it is hard to see how the claim raised in *Yoder* can be said to be more "central" (and thus more *religious* for free exercise purposes) than the claim of the *Sequoyah* plaintiffs. In *Yoder*, unlike *Woody*, the court dealt with practices that were not worship or religious ritual. These practices could be seen as religious only by indulging in a generous and lengthy implicit syllogism: the survival of the Amish religion depends on the successful inculcation of Amish values in each new generation; if Amish children attend public school, they may fail to acquire sufficient Amish values so as to make them adhere to the faith; if young people do not adhere to the Amish faith, the Amish religion will not survive; therefore, inculcation of Amish values is a central tenet of the Amish religion. As this syllogism makes clear, the *Yoder* "centrality" test offered by the *Sequoyah* court is spurious at best. The truly *central* tenets of the Amish faith concern matters of ritual and faith, not the practical problems of guiding children through adolescence.

In contrast, the *Sequoyah* plaintiffs have asserted a much

46. *Sequoyah*, 620 F.2d at 1163.

47. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

48. *Id.* at 215-16: "[For the Amish, religion and life-style are] . . . inseparable and interdependent The traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."

49. 604 P.2d 1068 (Alaska 1979).

50. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

51. The court might also have relied on language in *Sherbert*, 374 U.S. at 406, to support its "centrality" argument, as there the Supreme Court found that *Sherbert's* belief that she could not work on Saturdays was "a cardinal principle of her religious faith." However, *Sherbert* did not establish a "centrality" rule. The *Sherbert* Court used "centrality" as useful evidence of *sincerity*; in *Sequoyah*, the court has readily conceded plaintiffs' sincerity. In *Sherbert's* terms, then, the "centrality" inquiry in *Sequoyah* is superfluous.

stronger claim to religious centrality. Their claims concern the home of their gods and the ultimate origins of the Cherokee people. Surely the *Yoder* claims are more “cultural” than those presented in *Sequoyah*. Moreover, if the Cherokee practices are no longer “intimately related to daily living”⁵² except for a few devoted believers, it is only because the government, which now seeks to reject the Cherokee claims as not sufficiently central to the Cherokee faith to qualify for first amendment protection, had in the past systematically worked to deprive the Cherokees of their connection with the land and their sacred religion, which has always been tied to the land. It is remarkable that the Cherokee religion has survived at all, given the powerful forces historically arrayed against it.

The *Woody*⁵³ and *Frank*⁵⁴ courts found that certain practices of American Indians fell within the ambit of the free exercise clause. The *Sequoyah* court, however, used these cases not for their holdings but for their negative implications. *Woody* was a ground-breaking case. It recognized a free exercise exemption from a state ban on the use of peyote by a religious minority, the Native American Church, thus expanding free exercise thinking to encompass non-mainstream religions. Nevertheless, the holding was clearly a logical consequence of the *Sherbert*⁵⁵ decision.

Because the use of hallucinogenic drugs is a far more controversial issue than, say, the right to unemployment benefits claimed in *Sherbert*, the California court was careful to couch its opinion in narrow terms in order to preclude all but the strongest claims from staking out territory within the exemption. The *Sequoyah* court correctly remarked that *Woody* found peyote to “play a central role in the ceremony and practice of the Native American Church,” that the peyote ceremony comprised “the cornerstone of the religion,”⁵⁶ and that “[t]o forbid the use of peyote is to remove the theological heart of Peyotism.”⁵⁷ A degree of “centrality” equal to that of the practice examined in *Woody* should not be a necessary condition to a finding that a religious practice falls within the shelter of the free exercise clause of the first amendment, particularly in a case not involving the

52. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

53. *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

54. *Frank*, 604 P.2d 1068.

55. *Sherbert*, 374 U.S. 398 (1963).

56. *Sequoyah*, 620 F.2d at 1164.

57. *Id.*, citing *Woody*, 61 Cal. 2d at 722, 394 P.2d at 817-18, 40 Cal. Rptr. at 74.

controversial use of hallucinogenic drugs. *Woody* does not foreclose the possibility of a lower standard of significance for the protection of less controversial religious practices against secular interference.⁵⁸

*Frank v. Alaska*⁵⁹ poses even more difficult problems for the *Sequoyah* court. In *Frank* the Alaska Supreme Court held that an Athabascan Indian was not subject to prosecution under the state game laws for taking a moose out of season in order to provide food for a traditional funeral feast.⁶⁰ The court found that "[w]hile moose itself is not sacred, it is needed for proper observance of a sacred ritual which must take place soon after death occurs. Moose is the centerpiece of the most important ritual in Athabascan life and is the equivalent of sacred symbols in other religions."⁶¹ The eating of moose meat at a funeral feast appears no more centrally religious than worshipping and gathering traditional medicinal plants at the site of the origin of the Cherokee people and their religion.

Furthermore, although *Frank* speaks in the language of "centrality," it clearly does not *require* "centrality" as a necessary condition to free exercise protection. The *Frank* court cited a 1975 Eighth Circuit opinion, *Teterud v. Burns*,⁶² as sole federal authority speaking directly to the "centrality" issue. The *Teterud* court stated:

The appellant's argument appears to be premised on the theory that *Teterud* was required to prove that wearing long braided hair was an absolute tenet of the Indian religion practiced by all Indians. This is not the law. Proof that the practice is

58. See Note, *Dubious Intrusions—Peyote, Drug Laws, and Religious Freedom*, 8 AM. INDIAN L. REV. 79, 95 (1980). The student commentator suggests that the *Woody* "centrality" standard is constitutionally suspect and a dead end for future free exercise claims. The commentator argues that "present attitudes and legal standards constitute a distortion of first amendment religious liberties . . ." because the *Woody* "centrality" test sanctions intervention into religious life and freedom. The commentator contends that courts would better serve first amendment values if they followed Justice Jackson's advice "[to] have done with this business of judicially examining other people's faiths." *United States v. Ballard*, 322 U.S. 78, 95 (1944) (Jackson, J., dissenting).

Furthermore, suggests the commentator, if the Yoder family's "life-style," 406 U.S. at 215, is sheltered by the free exercise clause of the first amendment, so too is American Indian culture. Indian religion and culture are at least as closely interrelated as the religion and culture of the Amish.

59. 604 P.2d 1068 (Alaska 1979).

60. *Id.* at 1073.

61. *Id.*

62. *Id.*, citing *Teterud*, 522 F.2d 357 (8th Cir. 1975).

deeply rooted in religious belief is sufficient. It is not the province of government officials or court to determine religious orthodoxy.⁶³

The *Sequoyah* court dismissed *Teterud* as arising in an inapposite factual context not applicable to *Sequoyah*.⁶⁴ However, it failed to explain how *Teterud* differs conceptually from *Yoder*, *Woody*, *Frank*, and *Sequoyah*.⁶⁵

The court found that the Little Tennessee River valley was neither the "cornerstone" nor the "theological heart" of the Cherokee religion. Because the Cherokee plaintiffs established neither the "centrality or indispensability" of the valley to the practice of their religion nor the inseparability of their religious practices from their way of life, the court held that they failed to state a claim for which relief could be granted under the free exercise clause of the first amendment.⁶⁶ The court found that plaintiffs had instead merely stated a "personal preference" that did not rise to constitutional dimensions:

The overwhelming concern of the affiants appears to be related to the historical beginnings of the Cherokees and their cultural development. It is damage to tribal and family folklore and traditions, more than particular religious observances, which appears to be at stake. The complaint asserts an "irreversible loss to the culture and history of the plaintiffs." Though cultural history and tradition are vitally important to any group of people, these are not interests protected by the Free Exercise Clause of the First Amendment.⁶⁷

To the contrary, the affidavits that plaintiffs provided to the trial court⁶⁸ demonstrate that their concern was primarily and pro-

63. 522 F.2d at 360.

64. *Sequoyah*, 620 F.2d at 1163 n.2: "Typically they concern some official regulation of individual activity which infringes the right of a particular group or person to the free exercise of religion. E.g., *Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975) (prison regulation against long, braided hair)."

65. Recent decisions confirm that the "centrality" test plays no part in free exercise analysis. See, e.g., *Callahan v. Woods*, 658 F.2d 679 (9th Cir. 1981) (religiously based objection to Social Security numbering as a condition of qualifying children for public assistance sustained); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981) (statutory rule of accommodation permitting religionists to pay equivalent of union dues to charity not a violation of the establishment clause) (implicit free exercise grounding of statutory exemptions).

66. *Sequoyah*, 620 F.2d at 1164-65.

67. *Id.*

68. See *supra* text accompanying note 32.

foundly religious.⁶⁹ Further, even assuming that the court was correct on the facts, it was wrong on the law. There is no authority for its assertion that, in order to merit the protection of the free exercise clause of the first amendment, a religious practice must have its source exclusively in religious belief.⁷⁰ The Cherokee plaintiffs thus failed to pass the "quality of the claims" test, which the court set forth as the first of two steps in analyzing free exercise claims.⁷¹ The court concluded that "plaintiffs have not alleged infringement of a constitutionally cognizable First Amendment right."⁷² Since plaintiffs failed to satisfy the first step of the analysis, the court did not consider the second, the balancing test: "In the absence of such an infringement, there is no need to balance the opposing interest of the parties or to determine whether the government's interest in proceeding with its plans for the Tellico Dam is 'compelling.'"⁷³ On this basis, the court affirmed the trial court's judgment denying plaintiffs' motion for injunctive relief.⁷⁴

II. *The Navajo Claim: Badoni v. Higginson*

Rainbow Bridge National Monument is a 160-acre tract in southern Utah, entirely surrounded by the Navajo Indian Reservation. Within this tract is a remarkable sandstone arch, 309 feet high and spanning 278 feet, sacred to Navajos who adhere to the traditional tribal religion.⁷⁵ Glen Canyon Dam, located fifty-eight miles below the sandstone arch on the Colorado River, was completed in 1963. The waters rising behind the dam to form the Lake Powell Reservoir have risen to reach the Monument. When the Lake Powell project is complete, there will be forty-six feet of water underneath the Bridge. Under the supervision and management of the National Park Service, boating facilities have been supplied to assist tourists in visiting the Monument as part of the

69. See *supra* text accompanying notes 18-19.

70. See *Callahan*, 658 F.2d 679 and text accompanying note 42 *supra*.

71. See *supra* text accompanying notes 27-28.

72. *Sequoyah*, 620 F.2d at 1165.

73. *Id.*

74. Judge Merritt dissented only on the ground that the case should be remanded for "plaintiffs to offer proof concerning the centrality of their ancestral burial grounds to their religion." *Id.* Judge Merritt fully accepted the "centrality" test and the majority's reasoning; he simply believed that summary judgment was not an appropriate resolution of this matter in which the record indicated that the factual matter of the "centrality" of plaintiff's religious practice allegedly infringed by the closing of the dam was in dispute.

75. See *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980).

Park Service's operation of the adjacent Glen Canyon National Recreation Area.⁷⁶

In 1974 eight individual Navajos, three of them medicine men recognized by their people, brought suit to enjoin the Bureau of Reclamation, the National Park Service, and the Department of the Interior from continuing to act in such a manner as to destroy and desecrate the Navajo gods and sacred sites threatened by the rising waters of Lake Powell and by the influx of tourists.⁷⁷ The Navajo grounded their principal claim in the free exercise clause of the first amendment.⁷⁸ Intervening as defendants, agencies of the states of Utah and Colorado moved for judgment on the pleadings. The court treated the motion as one for summary judgment and granted it.⁷⁹

The pleadings of the Navajo plaintiffs set forth an elaborate ground for their first amendment claim for injunctive relief.⁸⁰ However, the court dismissed plaintiffs' claims on two alternative grounds.⁸¹ First, the court found that plaintiffs had no property interest in Rainbow Bridge National Monument and held that this lack of a property interest was dispositive of plaintiffs' claims. It cited no authority for the holding, stating only that "[t]he court feels that the lack of a property interest is determinative of the First Amendment question and agrees with defendants that plain-

76. *Id.* at 175.

77. *Badoni v. Higginson*, 455 F. Supp. 641 (D. Utah 1977).

78. U.S. CONST. amend. I. In addition, the Navajo raised two statutory issues not pertinent to the present discussion. See *Badoni*, 455 F. Supp at 643 (violations of the Colorado River Storage Project Act and of the National Environmental Policy Act).

79. *Badoni*, 455 F. Supp. 641 (D. Utah 1977).

80. *Id.* at 643-44:

Certain geological formations in the Rainbow Bridge area have held positions of central importance in the religion of the Navajo people . . . for at least 100 years. These shrines, which are regarded as the actual incarnate forms of Navajo gods, have performed protective and rain-giving functions for generations of Navajo singers. . . . Plaintiffs allege that the flooding of Bridge Canyon in the vicinity of Rainbow Bridge and the greatly increased tourist traffic due to defendants' actions have resulted in the following specific infringements upon plaintiffs' First Amendment rights: the destruction of holy sites; the drowning of entities recognized as gods by the plaintiffs; prevention of plaintiffs from performing religious ceremonies; desecration of holy sites, especially abodes of gods of the plaintiffs, by tourists; and, by virtue of all of this, injury to the efficacy of plaintiffs' religious prayers, and entreaties to their remaining gods . . . Plaintiffs request this court to order defendants to take appropriate steps to operate Glen Canyon Dam and Reservoir in such a manner that the important religious and cultural interests of plaintiffs will not be harmed or degraded, and to issue rules and regulations to prevent further destruction and desecration of the Rainbow Bridge area by tourists.

81. *Id.* at 644.

tiffs have no cognizable claim under the circumstances presented.”⁸² The court held out as persuasive a hypothetical situation proposed by defendants that involved a plaintiff who petitioned a federal court to restrict public access to the Lincoln Memorial because he had had an intense religious experience there.⁸³ The facile acceptance of defendants’ hypothetical situation, however, ignores the difference between the claims of American Indians seeking to protect their religion and the situation described in the hypothetical. The Indians sought to vindicate old claims on territory that was once theirs for a religion that has its roots in the very origins of the Indian people; the Lincoln Memorial litigant could make no such claim. Recognition of the Navajo plaintiffs’ first amendment claims would not have required a judgment in favor of defendants’ hypothetical plaintiff.⁸⁴

The court then presented an alternative ground of decision. Its cramped view of the free exercise test required by *Yoder*,⁸⁵ the difficulty of dismissing as nonreligious a claim that is on its face religious, and the superficial analysis and casual use of language in its first ground of decision led it into logical difficulties from which it failed to extricate itself.

The court began its analysis with the following statement: “[E]ven if plaintiffs’ claims were cognizable First Amendment claims . . . the interests of defendants would clearly outweigh the interests of plaintiffs.”⁸⁶ The court believed that even if plaintiffs

82. *Id.*

83. *Id.* at 645.

84. See TASK FORCE REPORT, *supra* note 3, at 8-12, for an analysis of the nature of the belief structure of American Indian religions. Defendants’ analogy to an individual’s spontaneous and contemporary religious experience is inappropriate, *see id.* at 88-98, although as a hypothetical case, it admittedly does raise troubling first amendment questions.

Id. at 12 states:

When the freedom of religion is discussed in the context of the tribal traditions, it is the right to adjust to and maintain relationships with the natural world and its inhabitants that is addressed The ceremonies and rites themselves set fairly precise rituals and reveal in the performance of the acts their continuing efficacy. While no future revelations can be ruled out, it would be the rarest of events for a new ceremony to be introduced. Except in the most remote areas of Indian country, the urbanization of North America has precluded both Indian and non-Indian from the constant relationship with the natural world that would be conducive to the revelation of further ceremonies.

85. 406 U.S. at 214.

86. *Badoni*, 455 F. Supp. at 645.

had been found to have standing under the property interest test, the religious claims they advanced were clearly outweighed by defendants' interests. However, the court then undercut the logic of this analysis by finding that plaintiffs' claims failed to pass the *Yoder* "centrality" test and therefore *were not religious claims* worthy of first amendment protection:

It is apparent that these interests do not constitute "deep religious conviction[s], shared by an organized group and intimately related to daily living. . . ."⁸⁷ [T]here is nothing to indicate that at the present time the Rainbow Bridge National Monument and its environs has [sic] anything approaching deep, religious significance to any organized group, or has in recent decades been intimately related to the daily living of any group or individual.

. . . .
Plaintiffs fail, however, to demonstrate in any manner a vital relationship of the practices in question with the Navajo way of life or a "history of consistency" which would support their allegation of religious use of Rainbow Bridge in recent times.

. . . .
In sum, the alleged interests of plaintiffs have not been established.⁸⁸

Applying the "deep religious significance," "intimately related to daily living," and "vital relationship" standards of *Yoder*, the court purported to hold that the Navajo lost the balancing test, when in fact it had held that the Navajo had not stated a religious claim under the free exercise clause. In support of its findings, the court pointed to two dispositive facts: first, the plaintiff medicine men were not "recognized by the Navajo Nation as such," their training was not "tribally organized," and it took place years ago; and second, the ceremonies were held too infrequently to qualify for constitutional protection.⁸⁹ The first assertion, however, was explicitly contradicted by a prior finding of the court⁹⁰ and, in any case, is meaningless when the relationship between tribal government and tribal religion is properly under-

87. *Id.*, citing *Yoder*, 406 U.S. at 216.

88. *Id.* 455 F. Supp. at 646.

89. *Id.*

90. *Id.* at 642: "Three of the individual plaintiffs are qualified and recognized among their people as medicine men—i.e., religious leaders of considerable stature among the Navajo, learned in Navajo history, mythology and culture, and practitioners of traditional rites and ceremonies of ancient origin."

stood.⁹¹ The second assertion may be of some significance when considering a religious claim within the mainstream Judaeo-Christian tradition, but it is irrelevant when applied to traditional religions of the American Indian.⁹²

The Tenth Circuit affirmed the district court's denial of relief and grant of defendants' motion for summary judgment. However, it substituted for one of the district court's alternative grounds of decision one of its own.⁹³ The court cited *Sequoyah* to support its rejection of the district court's conclusion that the Navajos' lack of a property interest in the Monument denied them standing to claim free exercise protection. Further, the court implicitly rejected the notion that *Yoder* required the application of a "centrality test"⁹⁴ to free exercise challenges to government activity.⁹⁵ The court did not attempt to demonstrate,

91. See, e.g., *Hearings on S.J. Res. 102*, *supra* note 1, at 242-43 (letter of Rev. Caleb Holetstewa Johnson, Personal Representative, Hopi Traditional Kikmongwis, Feb. 21, 1978):

On many reservations there are two group [sic] of Indians. On the one hand, there are the progressive Indians who are active in the Tribal Councils. On most reservation [sic], they have nothing to do with traditional Indians . . . In fact, on the Hopi reservation, it is the progressive tribal council which is making problems for the Traditional Hopis. It is the progressive tribal Council who is breaking down and interfering with the Hopi traditions and customs . . . the so-called progressives . . . in most cases, know nothing about the traditional ceremonials and traditional rites of the Indian Tribes.

See also S. REP. 709, 1978, *supra* note 9, at 5:

It is the intent [of Congress in enacting the American Indian Religious Freedom Act] that that source [of information concerning Indian religious practices] be the practitioner of the religion, the medicine people, religious leaders, and traditionalist [sic] who are Natives—and not Indian experts, political leaders, or any other nonpractitioner.

92. See TASK FORCE REPORT, *supra* note 3, at 10-11:

The tribal religions do not incorporate a set of established truths but serve to perpetuate a set of rituals and ceremonies which must be conducted in accordance with the instructions given in the original revelation of each particular ceremony or ritual . . . Unlike the larger religions, the ceremonial year did not commemorate specific chronological historical events, and some ceremonies were reserved for occasions that warranted them. Not all ceremonies needed to be performed each year in the manner that the Christian year follows the life and passion of Jesus, for example.

93. *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980).

94. *Id.* at 176-77.

95. *Id.* at 176:

At the outset, we reject the conclusion that plaintiffs' lack of property rights in the Monument is determinative. The government must manage its property in a manner that does not offend the Constitution. See *Sequoyah v. TVA*, 620 F.2d 1159, 1164 (6th Cir. 1980) (lack of property interest not conclusive, but is a factor in weighing free exercise and competing interests).

as had the district court,⁹⁶ that the Navajo claims were not sufficiently “central” to qualify for first amendment protection, but rather held directly that “Rainbow Bridge and a nearby spring, prayer spot and cave have held positions of *central importance* in the religion of some Navajo people living in the area for at least 100 years.”⁹⁷

The court then applied the balancing test mandated by *Yoder*⁹⁸ to the first of two injuries alleged by plaintiffs. Without extensive analysis, the court found that “the government’s interest in maintaining the capacity of Lake Powell at a level that intrudes into the Monument outweighs plaintiffs’ religious interest In these circumstances we believe the government has shown an interest of a magnitude sufficient to justify the alleged infringements.”⁹⁹ The court saw no delicate balance. The interests of an entire section of the nation in managing scarce water resources simply could not be overborne by religious claims of American Indians.

Plaintiffs had also contended that the National Park Service’s inadequate regulation of tourist behavior had infringed the free exercise of their religion. They sought “some measured accommodation”¹⁰⁰ by means of regulations to control the behavior of tourists at the Monument and thereby reduce the injury done to the Monument itself and to their religious practices. The court accepted that tourists had “desecrated [the Monument] by noise, litter and defacement of the Bridge itself.”¹⁰¹ After briefly surveying several free exercise cases, it decided that the rule of accommodation of *Wisconsin v. Yoder*,¹⁰² *Wooley v. Maynard*,¹⁰³ *McDaniel v. Paty*,¹⁰⁴ and *Sherbert v. Verner*¹⁰⁵ did not require the government here to take special steps because it “has not prohibited plaintiffs’ religious exercises in the area of Rainbow Bridge; plaintiffs may enter the Monument on the same basis as other people.”¹⁰⁶ To the contrary, the court found that any government initiative to control the behavior of tourists to the

96. See *supra* text accompanying notes 85-88.

97. *Badoni*, 638 F.2d at 177 (emphasis added).

98. *Yoder*, 406 U.S. at 214.

99. *Badoni*, 638 F.2d at 177.

100. *Id.* at 178, citing Appellants’ Brief at 8.

101. *Id.*

102. 406 U.S. 205 (1972).

103. 430 U.S. 705 (1977).

104. 435 U.S. 618 (1978).

105. 374 U.S. 398 (1963).

106. *Badoni*, 638 F.2d at 178.

Monument for the benefit of the Navajo in the exercise of their traditional religion would run afoul of the establishment clause of the first amendment.¹⁰⁷

The court supported its argument by noting that regulation of tourist behavior in order to protect Navajo religious practices at the Monument would infringe the right of the public to use the Monument for its own purposes.¹⁰⁸ The case law upon which the court relied to reach these two conclusions points consistently to contrary propositions. In support of its conclusion that there was danger of an establishment clause violation, the court cited only one case, *School District of Abington v. Schempp*.¹⁰⁹ The court there held that "there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."¹¹⁰ For the proposition that the public had a right of access that may not be regulated for the benefit of an individual's free exercise rights, the court cited a line of cases that stands for a precisely contrary conclusion.¹¹¹ The sections that follow will discuss each of these conclusions.

The Establishment Clause Misapplied

Government defendants have traditionally raised the establishment clause as a defense to free exercise claims.¹¹² However, recent jurisprudence suggests an integrated view of the two religion clauses of the first amendment that would posit the common goal that all religions prosper or decline without the help or interference of government. The two religion clauses should not operate as a system of checks and balances, one upon the other. Chief

107. *Id.*: "But what plaintiffs seek in the name of the Free Exercise Clause is affirmative action by the government which implicates the Establishment Clause of the First Amendment."

"Issuance of regulations to exclude tourists completely from the Monument for the avowed purpose of aiding plaintiffs' conduct of religious ceremonies would seem a clear violation of the Establishment Clause Were it otherwise, the Monument would become a government-managed religious shrine." *Id.* at 179.

108. "Exercise of First Amendment freedoms may not be asserted to deprive the public of its normal use of an area We must also deny relief insofar as plaintiffs seek to have the government police the actions of tourists lawfully visiting the Monument." *Id.*

109. 374 U.S. 203 (1963).

110. *Id.* at 222.

111. *Badoni*, 638 F.2d at 179.

112. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981); *McDaniel v. Paty*, 435 U.S. 638 (1978); *Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963).

Justice Burger has recognized that such a view requires the resolution of apparent conflict between the two clauses:

The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise.¹¹³

The Court has recognized that at least since *Everson v. Board of Education*,¹¹⁴ government may provide religious institutions with the basic services normally available to all other citizens without compromising establishment clause values.¹¹⁵ In the present case, Navajo plaintiffs sought protection from damage and desecration of a religious site located on federally managed land. Had the Navajo requested the same measures in order to protect an esthetic, economic, or ecological interest, the government would have had unquestioned authority to act. Yet the *Badoni* court held that the establishment clause barred the government from acting to protect a landmark geological structure simply because religious beliefs motivated the Navajo plaintiffs. Indeed, the Navajo plaintiffs did not actually seek affirmative government action on their behalf. Rather, they sought only that the government take steps to minimize the destructive impact of its management policies. In effect, the Navajo plaintiffs sought not to have their religion favored by government action, but only to have the impact of *hostile* government action reduced.¹¹⁶

The Supreme Court has consistently found that affirmative government action which has only the incidental effect of benefiting religious believers and institutions falls safely within the limits of the establishment clause.¹¹⁷ This rule of accommoda-

113. *Yoder*, 406 U.S. at 220-21. See also Justice Brennan's concurrence in *School Dist. of Abington v. Schempp*, 374 U.S. 203, 296-99 (1963).

114. 330 U.S. 1 (1947).

115. See, e.g., *Roemer v. Board of Public Works*, 426 U.S. 736, 747 (1976).

116. See Petition for Certiorari at 1-3 (Mar. 1981). See especially *id.* at 3: But it turns the First Amendment completely on its head to hold, as the Court of Appeals did here, that the Establishment Clause prevents the Government from tailoring its activities in otherwise unobjectionable ways—and in ways it might well have been employed in this very case if religion had not been involved—so as to minimize the Government's own positive inroads upon practices protected by the Free Exercise Clause.

117. See, e.g., *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Zorach*

tion is not, of course, unlimited; the three-part test most fully articulated in *Nyquist*¹¹⁸ sets the outer limit for government accommodation under the establishment clause.

The *Badoni* court was simply wrong in its conclusion that government action to protect Navajo religious practices would have converted the Monument into "a government-managed religious shrine."¹¹⁹ The *Nyquist* test demonstrates otherwise. As the Navajo plaintiffs observed, "[T]he whole point is that Rainbow Bridge is a religious shrine; it was that long before it was declared to be a national monument."¹²⁰ The court held that the accommodation that the Navajo requested would violate the second prong of *Nyquist*, which prohibits government action that has a primary effect of advancing one religion above all others.¹²¹ The second part of the *Nyquist* test, however, is framed in the alternative: The primary effect of the challenged government action must *neither* advance *nor* inhibit religion.¹²² The court loaded the dice against the Navajo in its framing of the question. The government is now acting in a manner that impairs the practice of the Navajo religion. Rather than ask whether acceding to the Navajo request would implicate the government in action that has as its primary effect the advancement of the Navajo religion, the court should have inquired whether government refusal to modify its injurious activity impermissibly inhibited the Navajo in the free exercise of their religion. The trial court's factual findings, which the appellate court accepted, make it abundantly clear that the government action, or refusal to modify its action, fell short of the standard set forth in the second part of the *Nyquist* test.¹²³

v. Clauson, 343 U.S. 306 (1952); *Everson v. Board of Educ.*, 330 U.S. 1 (1947), for illustrative cases in which the Supreme Court has permitted local government to provide certain services and benefits to parochial schools and their students in the face of establishment clause challenges.

118. See *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973). Under *Nyquist*, governmental action will survive an establishment clause challenge if it can be shown that the action is motivated by a secular legislative purpose, that its primary effect neither advances nor inhibits religion, and that it does not require excessive government entanglement with religious institutions and practices.

119. *Badoni*, 638 F.2d at 179.

120. Petition, *supra* note 116.

121. *Badoni*, 638 F.2d at 179.

122. *Nyquist*, 413 U.S. at 773.

123. For a recent district court decision that follows *Badoni* and inappropriately applies the second part of the *Nyquist* test, see *Hopi Indian Tribe v. Block*, No. 81-0841; *Navajo Medicinemen's Ass'n v. Block*, No. 81-0493; *Wilson v. Block*, No. 81-0558, 8 I.L.R. 3073 (D.D.C., June 15, 1981), *aff'd* No. 81-1912 (D.C. Cir. May 20, 1983).

The Public Forum Cases Misconstrued

The court held alternatively that regulations to protect Navajo practitioners from intrusion by tourists would be an impermissible burden on the right of those tourists to free access to the Monument.¹²⁴ In support of this proposition the court cited a familiar line of freedom of assembly and freedom of expression cases.¹²⁵ Implying that government regulation of the tourist crowds at the Monument to minimize interference with the practice of the traditional Navajo religion would violate a first amendment right of the tourists, the court insisted that the case law supported such a proposition: "Government action has frequently been invalidated when it has denied the exercise of First Amendment rights compatible with public use."¹²⁶

These cited cases, however, stand for a proposition quite contrary to that for which the court sought support. They stand instead for the proposition that the public right to free access to public forums must sometimes yield to the exercise of first amendment rights. In other words, these cases present a cogent argument for government intervention to protect the Navajo in their efforts to exercise their first amendment right to practice their religion. They do not support the government's refusal to act in order to avoid interfering with a tenuous first amendment right of tourists to the Monument.¹²⁷ Such an accommodation would not run afoul of the establishment clause. Indeed, read in tandem, the religion clauses demand it. When government action directly burdens the free exercise of a particular religion, the government does not offer favored treatment to that religion when it acts to lift that burden.¹²⁸

By choosing to balance the constitutional equities in favor of encouraging tourism, the court has effectively denied the Navajo the practice of their traditional religion. The court framed a choice between maintaining the Monument as a shrine or destroying it. Since it wrongly believed that the establishment clause of the first amendment barred the government from acting to preserve the Monument as a shrine, it voted for its destruction.

124. See note 108 *supra*.

125. *Badoni*, 638 F.2d at 179, citing *Shuttlesworth v. Birmingham*, 384 U.S. 147, 152 (1969); *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 320 (1968); *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965); *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939).

126. *Badoni*, 638 F.2d at 179.

127. See *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).

128. See, e.g., *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

III. *The Illusory Protections of the American Indian Religious Freedom Act*

Indian plaintiffs in both *Sequoyah*¹²⁹ and *Badoni*¹³⁰ invoked the protection of the recently enacted American Indian Religious Freedom Act.¹³¹ In *Sequoyah* the court dismissed the Cherokee claim under the Act as overborne by superseding legislation and thus did not examine the substance of the Act.¹³² In *Badoni* the court curtly refused even to consider the Navajo claims under the Act.¹³³ If the Act does not apply to the situations presented by the Indian plaintiffs in *Sequoyah* and *Badoni*, it is difficult to imagine what import it might have beyond its praiseworthy but ineffective statement of policy and expression of good will. As the following examination of the legislative history of the Act reveals, Congress never seriously intended to put teeth into the Act. Despite Senator Abourezk's protests, the executive branch took the hint. It has not construed the Act to modify any existing state or federal law,¹³⁴ but has seen its purpose as merely to state

129. *Sequoyah*, 620 F.2d at 1161.

130. *Badoni*, 638 F.2d at 180.

131. Act of Aug. 11, 1978, Pub. L. No. 95-341, 92 Stat. 469 (codified in part at 42 U.S.C. § 1996). See Appendix for full text.

132. *Sequoyah*, 620 F.2d at 1161:

Relief under the . . . Act . . . is foreclosed by a provision of the Energy and Water Development Appropriation Bill, Pub. Law No. 96-69 . . . "[N]otwithstanding provisions of 16 U.S.C., Chapter 35 [The Endangered Species Act] or any other law, the Corporation [TVA] is authorized and directed to complete construction, operate, and maintain the Tellico Dam" (Emphasis added.) No clearer congressional command is imaginable. No law is to stand in the way of the completion and operation of the dam.

133. *Badoni*, 638 F.2d at 180: "But we do not have before us the constitutionality of . . . [the Act] or of any action taken by defendants in alleged violation of them."

134. See *Hearings on S.J. Res. 102*, *supra* note 1, at 132-33 (colloquy between Larry L. Simms, Office of the Legal Counsel, Department of Justice, and Senator Abourezk, Chairman, U.S. Senate Select Committee on Indian Affairs):

Abourezk: What you are saying is, the administration—the Justice Department—would not want to see Congress overrule anything that happened before. I don't have to tell you that if Senate Joint Resolution 102 passes, it does overrule anything previously conflicting. Is that right?

Simms: Well, we are also here to find out what the intent is. . . . That is another thing we are unclear about.

See also, e.g., President Jimmy Carter, *Statement on Signing S.J. Res. 102 Into Law*, WEEKLY COMP. PRES. DOC. 1417-18 (Aug. 12, 1978): "This act is in no way intended to alter that guarantee [to worship freely] or override existing laws. . . ." See also S. REP. 709, 1978, *supra* note 9, at 11 (statement by George Goodwin, Deputy Assistant Secretary of the Interior for Indian Affairs): "We recommend passage of Senate Joint Resolution 102 with clarifying language . . . [which] would insure that no provision of the resolution

federal policy and announce an agenda for administrative and regulatory reform.¹³⁵

In his statement before the Senate Select Committee on Indian Affairs, Larry L. Simms, an attorney from the Department of Justice, raised the administration's concerns about what he identified as establishment clause and federalism problems with the proposed Act.¹³⁶ Simms advanced an administration proposal that Congress resolve the federalism problem and the question of the status of prior conflicting legislation by inserting limiting

would be construed as amending existing law." See *id.* at 12 (conclusion of committee): The resolution does direct the administration to change its regulations and enforcement practices wherever necessary to protect and preserve native American religious cultural rights and practices. If changes cannot be made consistent with present statutory intent, then the President must report back to Congress his recommendations for changes in existing law which will require further legislative action.

This conclusion comports substantially with the position taken by the Justice Department. See *id.* at 11 (remarks by Larry L. Simms):

Where conflicts arise that cannot be resolved within the existing statutory framework the proper course for the executive branch would be to seek legislation permitting Congress to declare its intent with regard to the balance to be struck between preservation of religious freedom and the achievement of the objectives of the specific programs involved.

Congressman Udall, sponsor of the Act in the House, made it abundantly clear that Congress intended to limit the authority of the Act. See 124 CONG. REC. H6871-73 (daily ed. July 18, 1978):

It is not the intent of my bill to wipe out laws passed for the benefit of the general public or to confer special religious rights on Indians . . . It has no teeth in it. It is the sense of the Congress . . . it is the Department's [of Justice] understanding that this resolution . . . does not change any existing State or Federal law. That, of course, is the committee's understanding and intent.

See also, *Indian Rights*, *supra* note 2, at 141: "[The Act] does not seek to correct any express federal policy which infringes upon Indians' religious practices. Instead, it attempts to rectify injustices which occurred from a lack of federal policy."

The United States Commission on Civil Rights has taken a similarly benign view of the Act. See U.S. COMM'N ON CIVIL RIGHTS, AMERICAN INDIAN CIVIL RIGHTS HANDBOOK (2d ed. 1980), at 6: "It is hoped [that] this process [specified in Section 2 of the Act] will ensure that government policies and practices take into account and do not unnecessarily interfere with Indian religious practices."

135. President Jimmy Carter, *Statement*, *supra* note 134, at 1417: "This legislation sets forth the policy of the United States to protect and preserve the inherent right of American Indian, Eskimo, Aleut, and Native Hawaiian people to believe, express, and exercise their traditional religions." See also *American Indian Religious Freedom: Report to Accompany H.J. Res. 738*, H.R. REP. No. 1308, 95th Cong., 2d Sess. 1 (1978):

The purpose of House Joint Resolution 738 . . . is to insure that the policies and procedures of various Federal agencies, as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion.

136. S. REP. 709, 1978, *supra* note 9, at 10-11 (statement of Larry L. Simms).

language into section 2 of the Act¹³⁷ and adding a third section.¹³⁸ Though the Committee accepted neither amendment, it appears to have accepted the *sense* of the amendments as part of the Act.¹³⁹ The Committee closed its report with the following finding: "In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by Senate Joint Resolution 102 as reported."¹⁴⁰ It thus required no leap of the judicial imagination for the *Badoni* and *Sequoyah* courts to find that the American Indian Religious Freedom Act had no bearing on the resolution of the free exercise claims advanced by the Indian plaintiffs. Congress's toothless expression of special concern for problems of Indian access to sacred sites, precisely the problem addressed in both *Sequoyah* and *Badoni*, was insufficient.¹⁴¹

Simms also expressed the Justice Department's concern that the Act might pose establishment clause problems, suggesting that the Act might be read so as "to give preferential treatment to Indian religious freedom beyond that afforded to other non-Indian religions."¹⁴² However, Simms did not offer any concrete examples as to how this concern of the Justice Department might materialize.

137. *Id.* at 11: "We would suggest that section 2 of the resolution be amended to read as follows: '. . . to implement such changes as may be consistent with existing statutes.'" (Emphasis added.)

138. *Id.*: "Section 3. Nothing in this resolution shall be construed as affecting any provision of State or Federal law."

139. See *supra* text accompanying notes 134-135.

140. S. REP. 709, 1978, *supra* note 9, at 12.

141. See *id.* at 2-3:

The first restrictions are denials of access to Indians to certain physical locations. Often, these locations include certain sites . . . which are sacred to Indian religions To deny access to them is analogous to preventing a non-Indian from entering his church or temple Federal agencies such as the Forest Service, Park Service, Bureau of Land Management, and others have prevented Indians in certain cases from entering onto these lands. The issue is not ownership or protection of the lands involved. Rather, it is a straightforward question of access in order to worship and perform the necessary rites.

142. See *id.* at 10:

This is not to say that the unique characteristics of Indian religious practices may not call for and permit accommodations different from those reached with respect to non-Indian religions. It is to say that there may be some situations in which a conscious preference accorded to some Indian religious practices [may] raise establishment clause and due process clause problems.

Apparently the Justice Department is willing to recognize the rule of free exercise accommodation. However, for reasons that are not apparent, Simms cites *Kennedy v. B.N.D.D.*, 459 F.2d 415 (9th Cir. 1972), to support his establishment clause concerns.

The Committee responded by clarifying its purpose: "[The Act] is in no way intended to provide Indian religions with a more favorable status than other religions, only to insure that the U.S. Government treats them equally."¹⁴³

Congress could not attempt to create by statute an exemption from the establishment clause strictures of the first amendment.¹⁴⁴ The only reported decision that deals with the substance of the Act takes precisely this position.¹⁴⁵

The draftsmen of the *Task Force Report*¹⁴⁶ were sensitive to the possibility of establishment clause challenges to the Act, as well as challenges to the administrative and legislative action that would be taken pursuant to the Act. The *Report's* first defense against such challenges, however, reveals only a superficial understanding of the implications of the establishment clause:

The establishment of a religion is not a problem when viewed from within the tribal context Establishment is fundamentally the imposition by the political institution of forms of belief and practice which are in conflict with or are distasteful to people of a different tradition. Protecting Indian religious practices from curiosity seekers, casual observers, and administrative rules and regulations is the only practical way that religious freedom can be assured to Indian Tribes and Native groups. It is not the establishment of their religion because their religions, not being proselytizing religions, seek to preserve the ceremonies, rituals and beliefs, not to spread them.¹⁴⁷

143. S. REP. 709, 1978, *supra* note 9, at 6.

144. *But cf.* Katzenbach v. Morgan, 384 U.S. 641 (1966); Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

145. *See* Navajo Medicinemen's Ass'n v. Block, No. 81-0493, 8 I.L.R. 3073, 3076 (D.D.C. June 15, 1981), *aff'd*, No. 81-1912 (D.C. Cir. May 20, 1983). The court stated that the Act is a guarantee of first amendment rights of American Indians and does not grant any rights not already found in the amendment. Once again, Indian plaintiffs lost a land access question, with the court holding that the Act does not require that access to publicly owned property be granted to Indians without consideration for other users or activities (in this case the development of the Snow Bowl ski resort in the sacred San Francisco Peaks area of Arizona).

See also U.S. Dept. of Agriculture, Forest Service, Chief's Decision on Request for Administrative Review of Southwestern Regional Forester's Decision Involving Arizona Snow Bowl Skiing Facilities and the Snow Bowl Road, Coconino National Forest, 8 I.L.R. 5011 (Dept. of Agric., Dec. 31, 1980).

146. TASK FORCE REPORT, *supra* note 3.

147. *Id.* at 12.

The *Report* suggests that only proselytizing religions can be "established" by government action. But the government cannot offer support to a religion without violating the establishment clause under the rule of *Nyquist*.¹⁴⁸ The *Report* offers no further establishment clause analysis, but merely reiterates that establishment clause strictures do not apply to traditional Indian religion:

Protecting the boundaries of state and church are certainly important, but to guarantee religious freedom to American Indians does not necessarily mean the establishment of traditional Native religions over and above other religions . . . It is possible to state that traditional Native religions have little chance of creating a national crisis in the church-state relationship.¹⁴⁹

[The Act] does not constitute the establishment of a religion. The premises of Native tribal religions differ so fundamentally from the religions of the majority in perspective and practice that the traditional dangers against which the establishment clause guards do not exist.¹⁵⁰

Whether this is in fact true remains to be seen, since *Navajo Medicinemen's Association*¹⁵¹ is the only reported federal court decision which addresses the substance of the Act. Given the extreme caution revealed by the legislative history,¹⁵² it seems unlikely that any agency of the federal government will seek to apply the Act in a controversial manner and thereby pose any difficult constitutional questions. Rather, the Act will more probably remain a benign statement of government policy and a direction to federal agencies to examine carefully their policies, regulations, and procedures which may have an impact on the practice of traditional American Indian religions.¹⁵³

Conclusion: A Proposal for Judicial Candor

Both *Badoni* and *Sequoyah* offer unprincipled resolutions of difficult and troubling situations in which government action has severely impaired the ability of American Indians to practice their

148. 413 U.S. 756.

149. TASK FORCE REPORT, *supra* note 3, at 89 and 98.

150. *Id.*

151. *Navajo Medicinemen's Ass'n v. Block*, No. 81-0493, 8 I.L.R. 3073, 3076 (D.D.C. June 15, 1981), *aff'd*, No. 81-1912 (D.C. Cir. May 20, 1983).

152. See *supra* notes 135-138 and accompanying text.

153. See American Indian Religious Freedom Act, Act of Aug. 11, 1978, Pub. L. No. 95-341, 92 Stat. 469, § 2 (codified in part at 42 U.S.C. § 1996). See Appendix for full text.

traditional tribal religions. Neither court advances first amendment jurisprudence in its analysis. Relying on a dubious "centrality" test, the *Sequoyah* court wrongly found that the Cherokee had failed to state a religious claim under the free exercise clause of the first amendment. The *Badoni* court assumed that competing interests would have outweighed any religious interests the Navajo might have asserted. It therefore declined to analyze the religious interest the Navajo had alleged. The court buttressed its holding with a poorly reasoned establishment clause attack on the Navajos' argument. Both courts affirmed summary judgments, foreclosing any possibility of an evidentiary hearing on factual matters relating to the Indians' claims. Neither decision offers any concrete guidance on the difficult free exercise issues these cases present. It still remains for a federal court to admit candidly that massive federal water projects that affect millions of people and large sections of the country will consistently weigh more heavily in the balance than the competing religious claims of isolated groups of American Indians. The historical inevitability of this result will not make the underlying hierarchy of values any more palatable.

Unfortunately, the American Indian Religious Freedom Act will likely continue to provide little aid to Indian plaintiffs such as those in *Sequoyah* and *Badoni*. Perhaps the Act will remind government officials responsible for formulating and applying the rules, regulations, and procedures of federal administrative agencies to be more solicitous of Indian religious interests. But the Act, an impotent statement of good intentions, will have no impact on the power relationship between white society and Indian society that is at the core of the problems relating to traditional Indian religious practice.

(Appendix follows)

Appendix

American Indian Religious Freedom Act:

PUBLIC LAW 95-341—AUG. 11, 1978

Public Law 95-341
95th Congress

Joint Resolution

American Indian Religious Freedom.

Whereas the freedom of religion for all people is an inherent right, fundamental to the democratic structure of the United States and is guaranteed by the First Amendment of the United States Constitution:

Whereas the United States has traditionally rejected the concept of a government denying individuals the right to practice their religion and, as a result, has benefited from a rich variety of religious heritages in this country;

Whereas the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems;

Whereas the traditional American Indian religions, as an integral part of Indian life, are indispensable and irreplaceable;

Whereas the lack of a clear, comprehensive, and consistent Federal policy has often resulted in the abridgment of religious freedom for traditional American Indians;

Whereas such religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws;

Whereas such laws were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices and, therefore, were passed without consideration of their effect on traditional American Indian religions;

Whereas such laws and policies often deny American Indians access to sacred sites required in their religions, including cemeteries;

Whereas such laws at times prohibit the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies;

Whereas traditional American Indian ceremonies have been intruded upon, interfered with, and in a few instances banned: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

SEC. 2. The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve

months after approval of this resolution, the President shall report back to the Congress the results of his evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action.

